

**NEW MEXICO ENVIRONMENT DEPARTMENT
DRINKING WATER BUREAU
ENFORCEMENT AND PENALTY POLICY**

BACKGROUND

The New Mexico Environment Department (NMED) is an executive agency of the State of New Mexico. In 1978, NMED was delegated Safe Drinking Water Act (SDWA) primacy from the U.S. Environmental Protection Agency (EPA). This delegation gives NMED the authority to enforce the state drinking water regulations and National Primary Drinking Water Regulations (NPDWR). The Secretary of NMED has delegated the enforcement of the regulations to the Director of the Water and Wastewater Infrastructure Development Division (WWIDD) through the Bureau Chief of the Drinking Water Bureau (DWB).

The purpose of this document is to provide a uniform enforcement policy for responding to violations of the state drinking water regulations or the NPDWR, and to provide guidance and directives to DWB enforcement staff. The staff of the DWB, under authority from the DWB Bureau Chief, is responsible for coordinating the DWB enforcement program. The policy will be made available upon request to any interested parties and the citizens of New Mexico. The policy will also be published on the DWB website: <http://www.nmenv.state.nm.us/dwb/index.htm>. Further information may be obtained by contacting the Bureau Chief of the DWB at (505) 476-8720 or toll free at (877) 654-8720.

AUTHORITY

The SDWA, 42 U.S.C.A. 300g et seq., authorizes the promulgation of NPDWR, 40 C.F.R. 141 et seq. The SDWA also provides states with primacy enforcement of regulations if the state's regulations have been approved by EPA.

The New Mexico Environmental Improvement Act (EIA) authorizes the New Mexico Environmental Improvement Board (EIB) to promulgate rules and standards consistent with the federal SDWA. NMSA 1978, § 74-1-8(A)(2). Additionally, the EIA empowers NMED to enforce the drinking water regulations promulgated by the EIB. NMSA 1978, § 74-1-7(A)(2).

Enforcement of the drinking water regulations is undertaken by the Drinking Water Bureau. The DWB is also responsible for Sanitary Projects Act (SPA) enforcement, NMSA 1978, § 3-29-7, and for the enforcement of certain provisions of the Utility Operators Certification Act (UOCA), as found in NMSA 1978, § 61-33-10.

The NMED requested drinking water primacy through an application to the EPA dated January 6, 1976. Primacy was granted through public notice in the Federal Register on January 20, 1978.

Under 40 C.F.R. 142.10, NMED has primacy responsibility for enforcing drinking water rules through the adoption of New Mexico Drinking Water Regulations (NMDWR), which are to be no less stringent than the National Interim Primary Drinking Water Regulations. The DWB enforces all statutory requirements as required by law and as the primacy agent and responds to violations of the state and federal drinking water regulations.

ENFORCEMENT TARGETING FORMULA

The EPA Enforcement Targeting Formula provides a method in which to rank-order all public water systems within New Mexico for enforcement purposes. The rank-order of each public water system is determined by the total points assigned based on the severity of each violation attributable to a system, and the number of years that the system's oldest violations have gone unaddressed.

Sum ($S_1 + S_2 + S_3 + \dots$) + n

S = violation severity factor

10 points- each acute health-based violation

5 points- each other health-based violation and Total Coliform Rule repeat monitoring violation

each Nitrate monitoring and reporting violation

1 point- each other monitoring and reporting, or any other violation

n= number of years that a system's oldest violations have been unaddressed

Any public water system with a score that is greater than or equal to 11 points is considered a priority system for enforcement. Priority systems must be able to immediately return to compliance upon notification or formal enforcement action is taken. Scores are recalculated for each system quarterly and upon a new violation event. Regardless of a system's ranking, each violation must be addressed.

INFORMAL ENFORCEMENT

Informal enforcement actions include:

1. Notices of Violation;
2. Initial contact with the water system;
3. Notification and request for return to compliance through verbal, in-person and written communication; and
4. Updating violation information and compliance assistance information through coding of activities into the Safe Drinking Water Information System (SDWIS) database.

Informal enforcement actions generally are initiated in the area offices. All informal enforcement actions will use approved forms/documents. Informal enforcement actions occur under the direction of the area office supervisors for all violations of the New Mexico Drinking Water Regulations, with oversight from the Compliance Operations Manager or the Bureau Chief. If a public water system continues to violate the NMDWR after informal enforcement activities have occurred, the public water system is referred to the Technical Services Manager or the Bureau Chief for formal enforcement action.

FORMAL ENFORCEMENT

Any public water system with a score that is greater than or equal to 11 points, as determined using the Enforcement Targeting Formula, will be considered a priority system for formal enforcement. Priority systems must be able to immediately return to compliance upon notification or formal enforcement action will be taken. Additionally, enforcement staff shall utilize formal enforcement if a violation is very serious and poses an immediate risk to public health. Formal enforcement actions include:

1. Administrative Compliance Order;
2. Administrative Compliance Order with Penalties;
3. Court-ordered injunction or temporary restraining order (TRO); and
4. Consent Orders.

Enforcement staff shall work with the NMED Office of General Counsel if formal enforcement involves the assessment of penalties or court actions, or if the Bureau determines that the matter is sensitive enough that it requires legal review. Administrative Compliance Orders must be signed in adherence with the annual NMED delegation document.

Formal Enforcement with Penalty

NMED has the authority under NMSA 1978, § 74-1-10(B)(1) to assess civil penalties for violations of the state's primary drinking water regulations. When an Administrative Compliance Order is issued, NMED may also issue a civil penalty that shall not exceed \$1,000 per violation per day. NMSA 1978, § 74-1-10(C). In assessing the penalty, NMED "shall take into account the seriousness of the violation and any good-faith efforts to comply with the applicable requirements." NMSA 1978, § 74-1-10(C). Penalties collected by the DWB must be deposited into the state treasury Water Conservation Fund. NMSA 1978, § 74-1-10(H).

Penalty Calculation Policy

The following penalty policy provides guidelines for calculating an appropriate penalty for a violation of the NMDWR, 20.7.10 NMAC. For a case involving multiple violations, the penalty for each violation is calculated separately and the penalties for each violation added together to calculate a total penalty.

This penalty policy is not intended to preclude NMED assessing the full statutory maximum in particularly egregious cases. An egregious case includes, but is not limited to, one where significant harm to public health, safety or welfare actually results or where the violations within the Department's jurisdiction are part of a larger wrongdoing that compromises the public's access to safe and reliable drinking water.

1. Select Initial Penalty from Matrix:

For violations of the NMDWR, the statutory penalty shall not exceed \$1,000 per violation per day. NMSA 1978, § 74-1-10(C). Each penalty is dependent on two components: a gravity component and a size component. The gravity component places greater weight on those violations having an extremely serious and acute potential to impact public health versus those less likely to do so. To illustrate, failure to monitor for total coliform is more heavily penalized than a failure to submit a report. The gravity component is broken down into "Minor", "Moderate" and "Major", with varying levels of each. Examples of such violations are as follows:

Minor	Moderate	Major
Fluoride secondary maximum contaminate level (SMCL)	Microbial Contaminates	Fecal coliform/E. coli
Consumer Confidence Report Availability	Inorganic Chemicals (IOCs)	Turbidity MCL (average of 2 days' samples > 5NTU), Turbidity (for treatment technique (TT) violations resulting from a single exceedance of maximum allowable turbidity level)
Public Notice	Lead and Copper Rule	Nitrate, Nitrite, and Total Nitrate and Nitrite, failure to take a conformation sample within 24 hours after an initial sample exceeds the MCL
	Synthetic Organic Chemicals (SOCs)	Chlorine Dioxide (maximum residual disinfectant level (MRDL)) where sample in distribution system the next day are also above the MRDL
	Volatile Organic Chemicals (VOCs)	Water borne diseases outbreak and other water borne emergency
	Radioactive Contaminates	
	Disinfection Byproducts and precursors	
	Chlorine	
	Chlorine Dioxide MRDL where any two consecutive daily samples at entrance to distribution system are above MRDL	
	Ground Water Rule	

Each penalty also contains a size component that adjusts the penalty to correspond to the size of the water system. This adjustment recognizes that small systems generally have less revenue and are less able to pay a penalty. It also recognizes that a violation on a large system constitutes a public health threat to a larger population than the same violation on a smaller system.

SYSTEM SIZE (population served)	GRAVITY									
	Minor			Moderate				Major		
	1	2	3	4	5	6	7	8	9	10
≤100	\$ 10	\$ 20	\$ 30	\$ 40	\$ 50	\$ 60	\$ 70	\$ 80	\$ 90	\$ 100
101-500	\$ 15	\$ 30	\$ 45	\$ 60	\$ 75	\$ 90	\$ 105	\$ 120	\$ 135	\$ 150
501-3,300	\$ 20	\$ 40	\$ 60	\$ 80	\$ 100	\$ 120	\$ 140	\$ 160	\$ 180	\$ 200
3,301-10,000	\$ 40	\$ 80	\$ 120	\$ 160	\$ 200	\$ 240	\$ 280	\$ 320	\$ 360	\$ 400
10,001-50,000	\$ 60	\$ 120	\$ 180	\$ 240	\$ 300	\$ 360	\$ 420	\$ 480	\$ 540	\$ 600
50,001-100,000	\$ 80	\$ 160	\$ 240	\$ 320	\$ 400	\$ 480	\$ 560	\$ 640	\$ 720	\$ 800
≥100,000	\$ 100	\$ 200	\$ 300	\$ 400	\$ 500	\$ 600	\$ 700	\$ 800	\$ 900	\$ 1,000

2. Add Multiple Day Component:

For violations that potentially affect public health and for technical violations, multiply the penalty from the matrix times the number of days the violation persisted. Violations extending beyond sixty days may continue to be counted on a “per day” basis, or the multi-day component may cease at 60 days, at the discretion of DWB management. For sampling or reporting violations, one sampling or reporting event is counted as one day, as opposed to tallying all of the days in between sampling or reporting events.

3. Adjustment for Good/Bad Faith:

Evaluate whether the violator acted in good faith or bad faith. A good faith reduction per violation of up to 50% may be applied if the violator discovered the violation, promptly reported it to NMED and is making an effort to resolve the violation. In contrast, a bad faith enhancement of up to 50% may be applied if the violator had been previously warned, has a history of noncompliance, knew or should have known that the conduct violated the law or is not taking action to resolve the violation. This enhancement is calculated against the total penalty per violation and rounded to the nearest whole dollar.

4. Calculate Penalty Per Violation:

	Matrix Penalty
+	<u>Multiple Day Component</u>
	SUB-TOTAL
x	<u>Adjustment for good or bad faith (±0 – 50%)</u>
	PENALTY

5. Settlement:

At the request of the violator, the DWB may enter into negotiations to settle a penalty amount issued through enforcement. Settlement negotiations must include DWB management. If the violator has an attorney at the settlement discussions, DWB shall inform OGC so that an NMED attorney can be assigned to assist the Bureau. Before the DWB meets with the violating party, it should establish a settlement position. The DWB may establish a settlement position lower than the civil penalty calculated under this Policy. The DWB should establish a settlement position by evaluating the following factors:

- a. The maximum civil penalty likely to be awarded by an administrative or judicial tribunal;
- b. Any information obtained by the DWB, including any new information provided by the violator; and
- c. The risk of litigation.

The DWB should not consider the following factors in determining the risk of litigation:

- a. The desire or philosophy to avoid litigation or procedural issues;
- b. Existing environmental contamination;
- c. Delay in the DWB's enforcement action; or
- d. DWB's past decision to forego enforcement or civil penalty for the same or similar violation.

It is possible that the violator may request an "ability to pay" reduction of the penalty. This reduction is only applied after a compliance order with penalties is issued and then only if the violator raises ability to pay in settlement discussions. The Bureau should only consider inability to pay if the violator provides evidence of such inability, typically three years of tax returns. Before a penalty is reduced for inability to pay, consideration should first be given to allowing the violator to pay the penalty over time.

The DWB must recalculate the civil penalty whenever it obtains new information affecting the basis for the civil penalty. The DWB may, in arriving at a final settlement penalty, deviate significantly from the penalty amount sought in an administrative compliance order, provided such discretion is exercised in accordance with the provisions of this Policy.

UTILITY OPERATOR CERTIFICATION ACT ENFORCEMENT

Under the Utility Operator Certification Act, “[i]t is unlawful to operate or allow the operation of a public water supply system or public wastewater facility unless the system or facility is operated by or under the supervision of a certified operator who meets or exceeds the appropriate certification level.” NMSA 1978, § 61-33-6. While the Surface Water Quality Bureau is tasked with the administration of the UOCA, the DWB may enforce against public water supply systems if they are in violation of NMSA 1978, § 61-33-6.

Similar to the enforcement provisions found in NMSA 1978, § 74-1-10, the UOCA allows for either the issuance of a compliance order, or enforcement in District Court. NMSA 1978, § 61-33-10. However, the maximum penalty amount is higher than for a violation of the drinking water regulations, and is not to exceed \$2,500 per day per violation. NMSA 1978, § 61-33-10(B).

The compliance order with penalties provision and the correlated penalty policy is to be used for UOCA enforcement, as well. However, the initial matrix penalty will have to be amended to take into consideration the \$2,500 (as opposed to \$1,000) statutory maximum. Therefore, the matrix for UOCA penalties would be as follows:

SYSTEM SIZE (population served)	GRAVITY									
	Minor			Moderate				Major		
	1	2	3	4	5	6	7	8	9	10
≤100	\$ 25	\$ 50	\$ 75	\$ 100	\$ 125	\$ 150	\$ 175	\$ 200	\$ 225	\$ 250
101-500	\$ 38	\$ 75	\$ 113	\$ 150	\$ 188	\$ 225	\$ 263	\$ 300	\$ 338	\$ 375
501-3,300	\$ 50	\$ 100	\$ 150	\$ 200	\$ 250	\$ 300	\$ 350	\$ 400	\$ 450	\$ 500
3,301-10,000	\$ 100	\$ 200	\$ 300	\$ 400	\$ 500	\$ 600	\$ 700	\$ 800	\$ 900	\$ 1,000
10,001-50,000	\$ 150	\$ 300	\$ 450	\$ 600	\$ 750	\$ 900	\$ 1,050	\$ 1,200	\$ 1,350	\$ 1,500
50,001-100,000	\$ 200	\$ 400	\$ 600	\$ 800	\$ 1,000	\$ 1,200	\$ 1,400	\$ 1,600	\$ 1,800	\$ 2,000
≥100,000	\$ 250	\$ 500	\$ 750	\$ 1,000	\$ 1,250	\$ 1,500	\$ 1,750	\$ 2,000	\$ 2,250	\$ 2,500

SANITARY PROJECTS ACT ENFORCEMENT

NMED, through the DWB, has enforcement authority granted to it by the Sanitary Projects Act (SPA). NMSA 1978, § 3-29-7(D). As with the EIA and the UOCA, the Bureau may issue a compliance order, or may pursue a civil action in District Court. However, the difference is that the SPA does not allow for civil penalties to be issued with the compliance order. If a system does not comply with the compliance order within the timeframe specified, the DWB may then issue a penalty of not more than \$250 for each day of continued non-compliance. NMSA 1978, § 3-29-7(F). As a penalty matrix would be non-effectual with such a small maximum penalty, DWB management should decide the penalty per day amount to be issued in a case of non-compliance. System size should be taken into consideration, as should the seriousness of the non-compliance, and any good faith behavior.

EMERGENCY POWERS OF THE SECRETARY

The New Mexico Drinking Water Regulations provide the Secretary of the Environment Department with emergency powers to protect public health under 20 7.10.300 NMAC. The Secretary has the ability to take “any action necessary” to protect the health of those served by a public water system. This broad authority shall be used in instances of suspected waterborne disease, criminal activity, breach of security, or water outages. The NMED Office of General Counsel shall be informed immediately if the use of emergency powers is believed to be necessary.

DIRECT EPA ENFORCEMENT

There may be circumstances where DWB finds it advantageous for EPA to either join with the State or intervene in certain enforcement situations. Direct federal enforcement is addressed in accordance with 40 C.F.R. 142.30 and is applicable with any primary drinking water regulation contained in 40 C.F.R. 141 or with any schedule or other requirements imposed pursuant to a variance or exemption granted under section 1415 or 1416 of the Act.

Additionally, the EPA may choose to take civil action unrequested by DWB. If the EPA determines that a public water system is in violation, it is obligated to tell the state and the public water system of the violation, and to offer advice and technical assistance. If the state has not taken enforcement action within 30 days after the original EPA notification, the EPA must issue an order requiring the public water system to come into compliance or the EPA will commence a civil action. 42 U.S.C.A. 300g-3(a)(1).

CRIMINAL ENFORCEMENT BY NMED


NMSA 1978, § 74-1-10(A) states that “[a]ny person who violates any regulation of the [Environmental Improvement Board] is guilty of a petty misdemeanor. This section does not apply to any regulation for which a criminal penalty is otherwise provided by law.” Petty misdemeanors are brought before magistrate judges (or Metropolitan judges, if occurring in Bernalillo County). Under NMSA 1978, § 31-19-1, a defendant convicted of a petty misdemeanor shall be sentenced by a judge to imprisonment for a definite term not to exceed six months, or to the payment of a criminal fine not to exceed \$500, or both. The sentencing is at the discretion of the judge. OGC will provide procedural and legal guidance if the Bureau believes that it is necessary to enforce in magistrate court.

CRIMINAL ENFORCEMENT BY EPA

For very serious violations, the DWB may want to refer a case to the EPA for possible federal criminal prosecution. DWB shall speak with the Office of General Counsel if it believes a federal criminal referral is warranted.

INDIAN LANDS

EPA or tribal environmental agencies shall address any non-compliance of facilities on federally recognized Indian lands.

Approval: 
**Water and Wastewater Infrastructure
Development Division Director**

Date: 12-10-2010